

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations,
(Fair Bluff, North Carolina)

) MM Docket No. 95-44

)

) RM-8602

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To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

CONSOLIDATED PETITION FOR RECONSIDERATION

Atlantic Broadcasting Co., Inc. ("Atlantic"), by and through counsel, and pursuant to §1.429 of the Commission's Rules (47 C.F.R. §1.429), hereby submits its Consolidated Petition for Reconsideration of the Commission's Order, DA 95-1772, released August 10, 1995 ("Rescission Order"), and Report and Order, DA 95-1774, released August 21, 1995 ("Report and Order II"), in the above-captioned proceeding.¹

In support whereof, the following is shown:

¹ This Consolidated Petition is timely filed pursuant to §1.4(b) and §1.429 of the Commission's rules which provide that petitions for reconsideration filed in rulemaking proceedings shall be filed within thirty days of the publication of the underlying Commission decision in the Federal Register. In this case, Atlantic is seeking reconsideration of both the Commission's Rescission Order, released August 10, 1995, and its subsequent Report and Order II, released August 21, 1995. The Commission's Rescission Order was not published in the Federal Register. Therefore, Atlantic is filing its Consolidated Petition within thirty days of the release the Commission's Rescission Order, or by September 11, 1995 (September 9, 1995, and September 10, 1995 were Commission "holidays").

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Background

1. Atlantic is the licensee of WDAR-FM, Darlington, South Carolina.

WDAR-FM operates on Channel 288C3 with a directional antenna to protect the reference point of the vacant allotment of Channel 287A at Fair Bluff, North Carolina. In its Petition for Rulemaking filed in this proceeding, Atlantic requested that the Commission delete Channel 287A at Fair Bluff to permit WDAR-FM to modify its license to operate as an omnidirectional station. In the alternative, Atlantic asked that a 13 kilometer east site restriction be imposed Channel 287A at Fair Bluff. Atlantic has already filed an application to modify the facilities of WDAR-FM to operate with a non-directional antenna which is currently pending as accepted for filing. See File No. BMPH-950224ID; accepted on Public Notice, Report No. 23525, released June 9, 1995.

2. In its Notice of Proposed Rulemaking, 10 FCC Rcd 4018 (1995) ("Notice"), the Commission considered Atlantic's alternative proposals. The Commission noted that it would not delete Channel 287A at Fair Bluff if it received an expression of interest in the vacant allotment. Three parties filed comments in this proceeding and each expressed an interest in constructing a new station on Channel 287A at Fair Bluff. Only one party, S.O.S. Broadcasting ("S.O.S"), objected on the ground that imposing a site restriction would make it difficult to locate an acceptable transmitter site.

3. In its Reply Comments, Atlantic demonstrated that the S.O.S.'s

concerns were misplaced. See Atlantic's Reply Comments at ¶¶4-6. Atlantic located a proposed transmitter site for the new Fair Bluff station and determined that the site would be available for use as the location for a new tower structure. See Reply Comments at "Technical Reply To Comments." Atlantic also contacted officials of the local building permit office who stated that they saw no reason why a building permit would not be issued for the proposed facility and that it would not pose a zoning problem. *Id.* Finally, Atlantic demonstrated that a new structure 105 meters high would have no detrimental aeronautical effect since the site was located 20 kilometers from the nearest airport and approval from the Federal Aviation Administration was probable. *Id.* Therefore, Atlantic conclusively demonstrated that the imposition of a site restriction would serve the public interest by permitting WDAR-FM to operate with improved service without any negative effect on the parties seeking a transmitter site for the new Fair Bluff station.

4. In its initial Report and Order, DA 95-1656, released August 2, 1995 ("Report and Order I"), the Commission retained Channel 287A at Fair Bluff , and imposed the site restriction requested by Atlantic. The Commission found that "the public interest would be served by site restricting the Fair Bluff allotment as proposed in the Notice so as to enable Station WDAR-FM to expand its service area by operating omnidirectionally." The Commission found that S.O.S. "provides no technical showing that a station operating within the site restricted area could not provide the required signal level to all of Fair Bluff," and rejected S.O.S.'s argument. Report and Order I, at ¶4. With respect to S.O.S.' concern that local regulatory

policies may make it difficult to locate an acceptable site with the restricted area, the Commission concluded that "S.O.S. again has failed to provide any evidence that such problems exist or are even likely." Id. The Commission accepted the evidence provided by Atlantic that local officials saw no reason why permission to construct a tower would pose a zoning or other local problem. Id.

5. Eight days after it issued its Report and Order I, the Commission made a complete "about-face" and issued a Rescission Order wherein it rescinded its earlier decision. The Commission noted that a revised Report and Order would be issued. On August 21, 1995, the Commission issued its Report and Order II wherein it attempted to explain its reason for refusing to impose a site restriction in this case. The Commission stated that it would not impose a site restriction on Channel 287A at Fair Bluff because:

It has been our general policy not to change reference coordinates for vacant allotments in the course of a rule making proceeding in the absence of other changes in the Table of Allotments or to entertain rule making petitions solely to change reference coordinates. See, e.g., Chatom, AL, DA 95-1548, released July 18, 1995; Grenada, MS, 7 FCC Rcd 4838 (1992).

Report and Order II, at ¶4.

6. The Commission then cited a number of reasons why it believed the imposition of site restriction in this case would not be in the public interest. Atlantic now seeks reconsideration of the Commission's decision.

**The Commission's Refusal to Impose a Site Restriction
Was Arbitrary and Capricious**

7. By refusing to impose the site restriction requested by Atlantic, the Commission held rigidly to an unreasonable policy which has no application in this case. The Commission claims that its policy is to reject a petition for rulemaking seeking a site restriction where no other change to the FM Table of Allotments is proposed. But, in this case, Atlantic did propose a change to the FM Table in its Petition For Rulemaking. **Atlantic sought the deletion of Channel 287A at Fair Bluff!** The fact that expressions of interest convinced the Commission to retain Channel 287A at Fair Bluff should not have prevented the Commission from imposing the site restriction requested by Atlantic. That no change to the FM Table of Allotments was ultimately made elevates form over substance to maintain a policy that serves no purpose and which does not serve the public interest.

8. The Commission claims that its policy against imposing a site restriction in the absence of a corresponding change in the FM Table of Allotments is to "protect the integrity of the FM Table of Allotments, which would be comprised [sic] were we to change reference coordinates to accommodate FM applications." Report and Order II at ¶4. However, as Atlantic has conclusively demonstrated, there will be no negative effect whatsoever if its requested site restriction is imposed in this case. Imposition of a site restriction will not prevent the filing of an application for vacant Channel 287A at Fair Bluff. Not only did Atlantic identify a possible transmitter site for potential Fair Bluff applicants, Atlantic also presented evidence that the restricted site would be available, that it would likely pass local zoning requirements and that the

site would obtain the approval of the FAA. This was ample proof that the integrity of the FM Table would not be compromised.

9. Instead of imposing the site restriction, the Commission cited to the same concerns that were expressed by S.O.S. and that the Commission flatly rejected in its Report and Order I. The Commission stated that: "....as prospective applicants for a vacant FM channel may be in the process of obtaining specific site locations, a change in the reference coordinates of a vacant allotment could alter significantly the area of site availability." Again, the Commission's concerns are misplaced. As the Commission earlier found, Atlantic has demonstrated that the ability of prospective applicants to locate an available, feasible tower site would not be harmed in this case. There exists at least one available and technically feasible tower site that may be specified by the applicant(s). The Commission failed to explain how it could base its turnabout on the unfounded concerns that it easily dismissed its Report and Order I. The Commission's decision was arbitrary and capricious and completely at odds with the public interest. The Commission failed to consider the real benefit to the public to be realized by WDAR-FM operating as an omnidirectional station, compared to the only theoretical burden of locating a radio station on a restricted site where the existences of multiple applications will delay new service at Fair Bluff for potentially years. Current processing of mutually-exclusive applications is frozen until the FCC can develop criteria to replace those rules found to be "arbitrary and capricious" in Bechtel v. FCC 10 F 3d 875 (D.C. Cir. 1993). By its action in Report and Order II,

the FCC compounds the damage done to the public interest by the delays caused as a result of Bechtel, supra.

10. The Commission believes cases support its decision. However, neither of those cases presents a similar fact pattern and, therefore, neither case is controlling precedent. In Chatom, AL, DA 95-1548, released July 18, 1995, the Petitioner proposed no change to the FM Table of Allotments and, as an initial matter, its petition for rulemaking was returned without consideration. In addition, at the time the Commission returned the petitioner's proposal, on April 26, 1995, there was pending an application for the vacant FM station at Chatom, Alabama. See File No. BPH-950417AC. Imposition of a site restriction would have meant that the pending applicant would have been required to amend its application. In the instant case, Atlantic proposed a **change** to the FM Table of Allotments but that change was later denied. The Commission initially considered Atlantic's request for an imposition of a site restriction and found a site restriction to be in the public interest. Moreover, there are no pending applications for Channel 287A at Fair Bluff that would be adversely affected by the imposition of the site restriction. In Grenada, MS, 7 FCC Rcd 4838 (1992), the party in question did not raise the possibility of imposing a site restriction until it filed a petition for reconsideration of the Commission's Report and Order. Therefore, the Commission had no opportunity to consider such an option and the petitioner's proposal was deemed an untimely counterproposal and denied. In the instant case, there was ample opportunity for public comment and the Commission carefully considered whether to impose a site restriction on Channel 287A at Fair

Bluff. These critical differences demonstrate why the Commission's policy against imposing a site restriction without a change in the FM Table of Allotments is not applicable here. The imposition of a site restriction was carefully considered and the corresponding potential harm that may accompany such an action was addressed and eliminated.

11. The Commission also claims to base its decision on certain other factors. None of these factors constitute a basis for rejecting Atlantic's proposal. The Commission states that its policy is to allot channels with the least site restriction possible in order to aid prospective applicants in finding a possible transmitter site. See, Report and Order II, citing, Vacaville, CA, 4 FCC Rcd 8315 (1989)(subsequent history omitted). In the instant case, Atlantic provided conclusive evidence that the imposition of a site restriction will not impair the ability of prospective applicants to obtain an available, feasible tower site. An available, feasible tower exists. Since Atlantic's request for a site restriction will not prevent the location of a tower site for the new Fair Bluff station, Atlantic's proposal complies with the Commission's stated policy on the imposition of a site restriction.

12. The Commission also stated that "[W]e do not believe that the benefits accruing from enabling Station WDAR-FM to operate omnidirectionally are sufficiently compelling to justify imposing such a substantially greater site restriction...than already necessary." Report and Order II, at ¶5. However, the Commission cites no precedent whatsoever for the policy that a petitioner must make a showing that is "sufficiently compelling" to justify the imposition of a site restriction.

The Commission's requirement was unfairly burdensome and constitutes a departure from past policy. Atlantic clearly demonstrated that its proposal was in the public interest since permitting WDAR-FM to operate omnidirectionally would mean that the station could provide service to an additional 3,800 persons without any negative effect on the potential for new FM service at Fair Bluff. Such a showing of public benefit was more than sufficient to support the imposition of a site restriction in this case.

Conclusion

13. The Commission has never explained its sua sponte turnabout in this case. When first presented with the issue of whether to impose a site restriction on the vacant Fair Bluff allotment, the Commission correctly dismissed the unfounded fears that were raised by S.O.S. However, later, the Commission found itself relying on the very same rejected arguments to support its decision to deny the imposition of a site restriction. The Commission was correct in its Report and Order I when it concluded that there was no evidence that the potential problems raised by S.O.S. "exist or are even likely." Report and Order I, at ¶4. The Commission erroneously relied on these rejected claims to support its reversed decision in this case.

WHEREFORE, the above-premises considered, Atlantic Broadcasting Co., Inc., respectfully requests that the Commission **REVERSE** its Order and Report and Order II, and impose a 12.7 kilometers (7.9 miles) northeast site restriction on vacant Channel 287A at Fair Bluff, North Carolina.

Respectfully submitted,

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September 11, 1995

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CERTIFICATE OF SERVICE

I, Denise Felice, a secretary in the law firm of Smithwick, & Belendiuk, P.C., certify that on this 11th day of September, 1995, copies of the foregoing were sent by first class mail, postage prepaid, to the following:

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